Supreme Court, U.S.
FILED
APR 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5454 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID RANDOLPH GRAY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To the Mississippi Supreme Court

BRIEF FOR PETITIONER

ANDRU H. VOLINSKY
SCHAPIRA AND VOLINSKY, P.A.
108 Bay Street
Manchester, NH 03104
Telephone: (603) 669-7603
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

2 cpy

QUESTION PRESENTED FOR REVIEW

Whether it was error for the Mississippi Supreme Court to affirm Petitioner's sentence of death by holding that the improper excusal for cause of a juror was harmless, contrary to *Davis* v. *Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINION OF THE COURT BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
A. THE MISSISSIPPI SUPREME COURT'S PREMISE THAT THE ERRONEOUS EXCUSAL FOR CAUSE OF A JUROR WAS HARMLESS BECAUSE THIS RULING, IN EFFECT, ONLY CORRECTED PRIOR RULINGS REFUSING TO STRIKE OTHER JURORS FAILS OF ITS OWN ACCORD BECAUSE THE PRIOR RULINGS, THAT REFUSED TO STRIKE JURORS WHO CLAIMED TO HAVE CONSCIENTIOUS SCRUPLES AS A MEANS TO AVOID JURY SERVICE, WERE CORRECT	9
B. THE ASSUMPTION THAT A PROSECUTOR AT TRIAL WOULD HAVE EXERCISED UNUSED PEREMPTORY CHALLENGES AGAINST JURORS HAD THEY NOT BEEN ERRONEOUSLY EXCUSED FOR CAUSE IS MUCH TOO SPECULATIVE TO RENDER THE ERRONEOUS EXCUSALS HARMLESS	13
1. The Nature Of A Jury's Sentencing Decision And The Inability To Fairly Review The Harm Caused By An Erroneous Exclusion Mandates A Per Se Approach	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES:	Page
Adams v. *Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)	21
Barclay v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418 77 L.Ed.2d 1134 *rah. den* 464 U.S. 874 (1983)	20, 21
Bernette v. *Illinois*, 45 Ill. 2d 227, 258 N.E.2d 793, (1970), rev'd, 403 U.S. 947 (1971)	16
Chapman v. *California*, 386 U.S. 18, 87 S.Ct. 824 17 L.Ed.2d 705 (1967)	21
Davis v. *Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976)	10, 13, 14,15, 16, 17, 22
Delaware v. *Van Arsdall*, 54 U.S.L.W. 4347 (Decided April 7, 1986)	22
Furman v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1963)	14
Gideon v. *Wainwright*, U.S. 355, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)	20
Gray v. *Mississippi*, 472 So.2d 409 (Miss. 1985)	1, 5, 9, 11
Gregg v. *Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)	14
Grijalva v. *State*, 614 S.W.2d 420 (Tex. Crim. App. 1981)	17
Harris v. *Texas*, 457 S.W.2d 903 (Tex. Crim. App. 1970), rev'd, 403 U.S. 947 (1977)	16
Ladetto v. *Massachusetts*, 356 Mass 541, 254 N.E.2d 415 (1969), rev'd, 403 U.S. 947 (1971)	16
Marion v. *Beto*, 434 F.2d 29 (5th Cir. 1970)	15, 16
Mathis v. *New Jersey*, 52 NJ 238, 245 A2d 20 (1968), rev'd 403 U.S. 946 (1971)	17
Moore v. *Estelle*, 670 F.2d 56 (5th Cir. 1982)	17, 18
Reynolds v. *U.S.*, 98 U.S. 145, 156-157, 25 L.Ed.2d 244 (1878)	12
Speck v. *Illinois*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), rev'd 403 U.S. 946 (1971)	16
Tajra v. *Illinois*, 45 Ill. 2d 227, 258 N.E.2d 793, (1970), rev'd, 403 U.S. 947 (1971)	16
Tumey v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed 749 (1927)	20
Vasquez v. *Hillery*, 54 U.S.L.W. 4069 (Decided January 14, 1986)	20
Wainwright v. *Witt*, ___ U.S. ___, 105 S.Ct. 844 83 L.Ed.2d 841, 851-852 (1985)	11, 12, 14, 15

Table of Authorities Continued

Page

Whan v. *Texas*, 438 S.W.2d 918 (Tex. Crim. App. 1969) rev'd, 403 U.S. 946 (1971) 16

Wigglesworth v. *Ohio*, 19 Ohio St. 2d 171, 248 N.E.2d 607, (1969), rev'd, 403 U.S. 947 (1971) 16

Witherspoon v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1779, 20 L.Ed.2d 776 (1968) 10, 14

OPINION OF THE COURT BELOW

The opinion of the Mississippi Supreme Court is reported at *Gray* v. *Mississippi*, 472 So.2d 409 (Miss. 1985).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Fourteenth Amendment, United States Constitution:

1. Citizenship rights not to be abridged by States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

STATEMENT OF THE CASE

A. Procedural History

Selection of a jury and commencement of Petitioner's capital murder trial occurred on August 9, 1982. Petitioner was convicted and sentenced to death on August 12, 1982.

The Mississippi Supreme Court entered its opinion, en banc, on June 5, 1985. The Mississippi Supreme Court affirmed Petitioner's conviction and sentence of death.

The Court was divided, 6 to 3, on the issue presented herein.

Petitioner requested rehearing by the Mississippi Supreme Court. Said request was denied on July 24, 1985.

Petitioner applied for certiorari to the Mississippi Supreme Court on September 25, 1985. This Court granted Petitioner's application and request to proceed in forma pauperis on February 24, 1986.

B. Statement Of Facts

The issue presented for review in this matter relates solely to the Mississippi Supreme Court's finding that the erroneous excusal for cause of a prospective juror was harmless. Petitioner does not contest his conviction here. Thus, the factual allegations and assertions made by the State (herein, respondent, the State of Mississippi, shall be referred to as "State") and Petitioner at trial are not relevant and are not presented here. The circumstances of the voir dire are relevant and are presented in detail.

The jury selection in this capital murder case took less than one day. The procedure employed by the trial court involved seating 12 potential jurors in the jury box. At first, the Court questioned the venire preliminarily as to knowledge of the case and bias. The Court explained that the proper test to be accepted as jurors "is that [the jurors] come into the Box without any bias, prejudice or feeling, with no desire to do anything other than to return a verdict to which the evidence might conduct you." (Transcript of the trial, hereafter abbreviated, "T"., 336). The prosecution was then permitted to question the 12 prospective jurors seated in the box. Later, the court dispensed with its preliminary questioning and the prosecutor took over this role.

Motions to strike jurors for cause were made and ruled upon as the basis for the challenge developed. (See, e.g., Joint Appendix, hereafter "JA____.," 3). Peremptory strikes were exercised by the State in two ways. At times, the prosecutor exercised a peremptory challenge immediately after his challenge for cause was overruled. The prosecutor also exercised peremptory challenges when he finished each round of questions to the venire. (See, e.g., T. 439-440).

After the State completed its questions, the stricken members of the venire were replaced and the prosecutor was permitted to question the new jurors and exercise peremptory challenges against them. (See, e.g., T. 456).

This process continued until the prosecution was satisfied with the twelve empanelled jurors. The defense then followed the same procedure. After the defense was satisfied, the prosecution was permitted to question any jurors not previously questioned by him. The prosecution also was able to exercise strikes against any of the new members of the panel.[1] The procedure was then repeated until both sides agreed to the twelve jurors seated in the box.

The potential jurors in this matter were questioned in each other's presence. Although questioning, for the most part, was directed to individual jurors, each prospective juror was able to hear the questions and responses previously made and was able to learn the ramifications of particular responses.

---

[1] It is clear that the parties could not go back and strike members of the panel that were previously accepted. At one point, the trial court even accused a group of previously accepted jurors from the courtroom so that they would not be required to listen to the repetitive voir dire. (T. 561).

The prosecutor questioned each potential juror extensively concerning that juror's conscientious scruples against the imposition of the death penalty. Any prospective juror who showed the least bit of equivocation was challenged for cause, and where overruled, peremptorily stricken. (See, e.g., JA 4-5).

During the voir dire, the trial court noticed that certain prospective jurors claimed to have conscientious scruples against the death penalty simply as a means to gain excusal from the case. The judge complained to the venire that they were not being fair in this regard (JA 16).

Several prospective jurors were challenged for cause by the State. (JA 3, 5, 6, 9, 12, 14, 16). The Court denied the State's motions and the State decided to strike each of these jurors peremptorily. Id. One cause challenge relative to scruples against the death penalty was granted. (T. 506).

"It is abundantly clear from the record that [the trial judge's] reason for [refusing to strike these jurors for cause] was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service." *Gray*, 472 So.2d at 421 (footnote omitted).

The trial court was in a position to observe the demeanor of the prospective jurors and the tenor of their responses. The Mississippi Supreme Court accepted the trial court's factual findings concerning the credibility of the prospective jurors. The trial judge's findings are certainly supported by the record.

The attempts to avoid jury service were obvious. Even the prosecutor recognized the fact that prospective jurors claimed to have stronger conscientous scruples than perhaps they actually had. The following comment was made

by the prosecutor to venireman Lassabe, one of the prospective jurors that the trial court refused to excuse for cause.

> Let me tell you this, let me say this to you before you answer, Mr. Lassabe. I need to know whether you believe in that or whether you want to get off the Jury, you'd just rather not serve. (JA 13).

Mr. Lassabe denied that he was trying to avoid jury service. Rather, he claimed that he had just simply "never settled it in [his] own mind." (JA 13).

The prosecution, nonetheless, moved to strike Mr. Lassabe for cause. (JA 15). The trial court overruled the challenge (JA 15) and the State struck Mr. Lassabe peremptorily. (JA 15).

It is clear that the trial court understood and exercised its fact-finding function. The trial court's ruling, excusing prospective juror, Schleh, is apposite on this point. Mrs. Schleh stated that she could never vote to impose the death penalty in any case. Her testimony was credited and she was stricken for cause. (T. 504-506).

Problems arose for the trial court, however, when it came time to question prospective juror, Mrs. H. C. Bounds. The trial judge struck Mrs. Bounds for cause (JA 26). The Mississippi Supreme Court unanimously found this ruling constituted error. *Gray*, 472 So.2d 422 and 424.

Initially, Mrs. Bounds was questioned by the prosecutor. He asked, "And do you have any conscientious scruples against capital punishment when imposed by law?" (JA 16) Mrs. Bounds responded, "I don't know." (JA 16)

The next few questions posed by the prosecutor were long and confusing. Finally, the prosecutor asked the trial court to intercede.

The trial court then asked Mrs. Bounds a proper question, "Would you automatically vote against the imposition of the death penalty without regard to any evidence that might be developed in the trial in this case?" (JA 17). Mrs. Bounds responded that "[she] would try to listen to the case." (JA 17).

The Court then directed Mrs. Bounds to answer the question yes or no. The question was reread to Mrs. Bounds twice so that she was sure to understand it. In response Mrs. Bounds stated, "No, sir." (JA 17). She would not automatically vote against the death penalty.

Later, Mrs. Bounds went on to say that she would do her best. The Court credited Mrs. Bounds' testimony and stated that "[n]obody's doubting your sincerity, Mrs. Bounds." (JA 18).

The same question was then put to Mrs. Bounds again by the court. This time she answered "No, sir, I don't think I would." (JA 18). The prosecutor complained that Mrs. Bounds had couched her response in equivocal terms. The question was then put to Mrs. Bounds by the court two more times. Each time she responded, "No." (JA 18).

Over defense objection, the prosecutor was permitted to question Mrs. Bounds once again on the same issue. Again, the prosecutor's questions were lengthy and confusing and met with equivocal responses.

Yet again, the trial judge put the proper question to Mrs. Bounds prefacing the question by reasserting his belief in Mrs. Bounds' honesty and sincerity. After clarifying the question, Mrs. Bounds was asked if she had such conscientious scruples that would cause her to automatically vote against the death penalty. Mrs. Bounds

responded in the negative and further stated that she thought she could vote for the death penalty. (JA 22).

The prosecutor then asked the court to reverse one of its previous rulings that denied a challenge for cause against prospective jurors Ruiz, Coker, Arlean Walker, Annie Mae Bush, Lassabe, or Price because by this point the State had used all of its allotted peremptory challenges. (JA 22).

The trial court reponded to the State's motion by instructing the prosecutor to:

> Go ask her if she'd vote guilty or not guilty, she could vote guilty or not guilty and let's see what she says to that. If she says, if she gets to equivocating on that, *I'm going to let her off as a person who can't make up her mind*. (JA 23). (Emphasis added)

Mrs. Bounds was asked by the prosecutor if she could reach a verdict one way or the other and responded that she could do so. (JA 24).

> The prosecutor then asked Mrs. Bounds:
>
> You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the death penalty on this 28 year old defendant? (JA 24).
>
> Mrs. Bounds responded "Yes." (JA 24).

The prosecutor then moved to challenge Mrs. Bounds for cause. Over objection, Mrs. Bounds was excused for cause. (JA 25-26).

SUMMARY OF ARGUMENT

A. The Mississippi Supreme Court unanimously found that one juror had been erroneously excused for cause. The Court, nonetheless, found this error to have been harmless. The Court found the error harmless because it believed that other rulings of the trial court, refusing to strike jurors for cause, improperly resulted in the State being required to exercise all of its allotted peremptory challenges. Had the State not been required to use all of its peremptory challenges, at least one challenge would have remained to challenge the juror improperly excused by the trial court. This premise of the Mississippi Supreme Court fails of its own accord. The trial court's refusal to strike certain jurors for cause was not erroneous. The trial court found that jurors claimed to have scruples against the imposition of the death penalty simply as a means of avoiding jury service. The Mississippi Supreme Court credited this finding of fact. The trial court's rulings, based on his findings of credibility, were correct. Thus, the prosecution did not have any peremptory challenges remaining.

B. Assuming *arguendo* that any peremptory challenges remained in the hands of the State, this cannot render the erroneous excusal of a juror harmless. Appellate courts cannot speculate as to the curative effect, if any, of remaining challenges. It is fundamentally unfair to indulge in such speculation when attempting to determine whether such an error is harmless or not.

C. The function of a jury in determining which capital defendant should live or die is so unique and so closely related to the morals and conscience of the community from which the jury is drawn that it is not appropriate to review the erroneous exclusion of prospective jurors on a harmless error basis. An appellate court should not substitute its judgment for that of a jury's. The nature of the jury's decision and the inability to fairly review the harm caused by an erroneous exclusion mandates a per se approach.

ARGUMENT

A. THE MISSISSIPPI SUPREME COURT'S PREMISE THAT THE ERRONEOUS EXCUSAL FOR CAUSE OF A JUROR WAS HARMLESS BECAUSE THIS RULING, IN EFFECT, ONLY CORRECTED PRIOR RULINGS REFUSING TO STRIKE OTHER JURORS FAILS OF ITS OWN ACCORD BECAUSE THE PRIOR RULINGS, THAT REFUSED TO STRIKE JURORS WHO CLAIMED TO HAVE CONSCIENTIOUS SCRUPLES AS A MEANS TO AVOID JURY SERVICE, WERE CORRECT.

The Mississippi Supreme Court unanimously found that the exclusion of Mrs. Bounds was error.

> "Mrs. Bounds' voir dire was lengthy and confusing. Nonetheless, she positively stated several times that she could vote for the death penalty should the circumstances warrant it. Although her responses were at times equivocal, she was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria. *Gray* v. *Mississippi*, 472 So.2nd 409, 422 (Mississippi, 1985).

The six member majority of the Mississippi Supreme Court, however, went on to find that the improper excusal of Mrs. Bounds was harmless. The majority considered the error harmless because "[t]he force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance." 472 So.2d at 422-423.

The Mississippi Supreme Court's rationale for finding the *Witherspoon*[2] error harmless was clearly premised on the belief that the trial court erred in refusing to strike five previously challenged jurors for cause. Once the trial court overruled the State's challenges for cause, the State then was "forced" to challenge these jurors peremptorily. Thus, the rationale continues, had the trial court stricken the previous jurors for cause, the State would not have been required to use all of its allotted peremptory challenges and would have had at least one remaining with which it could have excused Mrs. Bounds without creating any error.

The Mississippi Supreme Court rationale is a variant of the argument that unexercised peremptory challenges render erroneous exclusions for cause harmless. This argument was rejected in *Davis* v. *Georgia*, 429 U.S. 122, 97, S.Ct. 399, 50 LEd.2d 339, (1976).

For reasons discussed in the next section of this argument, this Court should maintain the precedent of *Davis*. However, before considering the propriety of *Davis*, this Court must consider the factual circumstances of the case now before it and determine whether it is even necessary to consider *Davis* under these facts.

As previously stated, the Mississippi Supreme Court's opinion is premised on the idea that the trial court erred in failing to excuse five jurors who expressed conscientious scruples against the imposition of the death penalty.[3] The

[2] *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1779, 20 L.Ed.2d 776 (1968).

[3] The Mississippi Supreme Court's rationale actually has two parts. First, the trial court erred in refusing the requested challenges for cause. Second, this refusal required the State to exercise its peremptory challenges. While this portion of Appellant's argument focuses on the first part of the rationale because it is factually incorrect, the second part of the rationale fails as a logical matter. The trial court's rulings did not force the State to exhaust its peremptory challenges. The State did so of its own accord.

trial court's rulings, however, were not erroneous.

The trial judge, who was present to observe the demeanor of the jurors and the tenor of their responses, did not credit the claims of conscientious scruples voiced by the jurors. Rather, the court believed the jurors used these insincere attestations as a means of avoiding service on the jury. The Mississippi Supreme Court recognized and accepted these factual findings.

> When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances. The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to them. *It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service.* 472 S2d at 421 (Footnote omitted) (Emphasis added.)

The trial court found jurors' claims of conscientious scruples not to have been credible. A juror that does not *honestly* maintain views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," *Wainwright* v. *Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841, 851-852 (1985), should not be stricken.

In *Witt*, although in a slightly different context, this Court recognized that "deference is to be paid to the trial judge who sees and hears the juror." *Witt*, 83 L.Ed.2d at

853. "[T]he question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind . . . such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 83 L.Ed.2d at 854. (Footnote omitted).

Although these comments on judicial deference are contained in the portion of the *Witt* opinion that considered the deference due a trial court on federal review under 28 U.S.C. 2254, the reason for granting the trial court such deference applies equally here. "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below on such a question of fact, except in a clear case." *Reynolds* v. *U.S.*, 98 U.S. 145, 156-157, 25 L.Ed 244 (1878) [Cited in *Witt*, 83 L.Ed.2d at 854].

The trial judge here exercised his traditional fact finding function when he refused to strike the challenged jurors for cause. The court affirmed its previous rulings during the questioning of Mrs. Bounds.[4]

The Mississippi Supreme Court's affirmance of Petitioner's sentence of death ignores the ten year old precedent of *Davis* v. *Georgia*, supra. The Mississippi Supreme

---

[4] The prosecution complained that the Court's refusal to strike prospective jurors Ruiz, Coker, Walker, Bush, Lassabe and Price was error (JA 22) and that the Court should reverse its rulings. (JA 23). The court refused, "I'm not going to add any to [the prosecutor's] challenges . . . I'm not going to go back and give him five more. I'm going to excuse [Mrs. Bounds] for cause." (JA 26).

Court's decision to ignore *Davis* was based upon a reading of the records that its own opinion reveals as being clearly erroneous.

On the facts of this case, this Court should not even begin to consider the propriety of the rule set out in *Davis*. It should follow the dictates of *Witt*, credit the trial judge's findings of fact and hold that there were not circumstances present in the voir dire of Petitioner's case that could have rendered the erroneous exclusion of Mrs. Bounds harmless. Petitioner's sentence of death should be reversed.

B. THE ASSUMPTION THAT A PROSECUTOR AT TRIAL WOULD HAVE EXERCISED UNUSED PEREMPTORY CHALLENGES AGAINST JURORS HAD THEY NOT BEEN ERRONEOUSLY EXCUSED FOR CAUSE IS MUCH TOO SPECULATIVE TO RENDER THE ERRONEOUS EXCUSALS HARMLESS.

No circumstance that exists in the record of this case can justify a finding that the erroneous excusal of Mrs. Bounds was harmless. However, as this Court may find it necessary to address the precedent of *Davis* v. *Georgia*, supra, Petitioner here sets out the factors that support the continued validity of the ten year old precedent of *Davis*.

In *Davis*, a six member majority of this Court reversed the Supreme Court of Georgia's affirmance of Appellant, Davis' sentence of death. The Georgia Supreme Court had held that, "[t]he rationale of *Witherspoon* and its progeny is not violated where merely one of a qualified class or group is excluded where it is shown, as here, that others of such a group were qualified to serve." 236 Ga. 804, 809-810, 225 S.E.2d 241, 244-245, (Cited in *Davis*, 429 U.S. at 123).

This Court expressly rejected the Georgia Supreme Court's rationale. "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' [*Witherspoon*] 351 U.S. at 522 n.21, 88 S.Ct. at 1777, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." *Davis*, 429 U.S. at 124.

Witherspoon prohibited the imposition of a sentence of death by a jury "chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777. Such a jury was considered a "hanging jury." Id. 391 U.S. at 523. The state was flatly prohibited from "stack[ing] the deck" in such a fashion, *ibid.*, to enhance the likelihood of executions.

Witherspoon was subsequently modified in *Wainwright* v. *Witt*, supra. *Witt* held *Witherspoon* to have been fact specific. 83 L.Ed.2d 847-848. The Illinois sentencing procedure considered in *Witherspoon* vested the jury

> with unlimited discretion in choice of sentence. Given this discretion, a juror willing to consider the death penalty arguably was able to "follow the law and abide by his oath" in choosing the proper sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable where those who would never vote for the death sentence or who could not impartially judge guilt. *Witt*, 83 L.Ed.2d at 850. (Emphasis omitted).

Given the limitations placed upon sentencing discretion after *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and *Gregg* v. *Georgia*, 428 U.S. 153, 96

S.Ct. 2909, 49 L.Ed.2d 859 (1976); the Court in *Witt* found the *Witherspoon* standard for exclusion of scrupled jurors inappropriate. The Court in *Witt*, however, did nothing to change the consequence of an improper exclusion. It only changed the standard for exclusion. "[I]f a venireman is improperly excluded . . . any subsequently imposed death penalty cannot stand. *Davis*, 429 U.S. at 124, 97 S.Ct. 15 400.[5]

Prior to *Davis*, in 1970, the United States Court of Appeals for the Fifth Circuit considered, for the first time, the consequences of the improper exclusion of a juror from a capital murder trial. *Marion* v. *Beto*, 434 F.2d 29 (5th Cir. 1970). In his opinion, Judge Simpson described some of the factors considered by the court in reaching its conclusion that the improper exclusion of even a single venireman requires reversal.

> The magnitude of a decision to take a human life is probably unparalled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a

---

[5] As previously stated, the standard for exclusion of veniremen has been converted so as to exclude anyone whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 83 L.Ed.2d at 852 (Footnote omitted.)

> defendant. Although a defendant certainly has no assurance that a properly empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case. 434 F.2d at 32 (Footnote omitted.)[6]

In addition to *Marion* v. *Beto*, a number of other courts have considered the proper consequences of the erroneous exclusion of scrupled veniremen. Some upheld the sentences of death on the theory that the presence of unused peremptory challenges rendered any errors harmless. A plethora of these cases were summarily reversed by this Court. See, *Wigglesworth* v. *Ohio*, 19 Ohio St. 2d 171, 181, 248 N.E.2d 607, 614 (1969) (one erroneous exclusion, 5 or 6 unused peremptories), *rev'd*, 403 U.S. 947 (1971), cited in *Davis* v. *Georgia*, *supra*. 429 U.S. at 123; *Harris* v. *Texas*, 457 S.W.2d 903, 908, 909 n.3 (Tex. Crim. App. 1970) (one erroneous exclusion, 4 unused peremptories), *rev'd*, *403 U.S. 947 (1971)*, *cited in Davis* v. *Georgia*, *supra*, 429 U.S. at 123; *Whan* v. *Texas*, 438 S.W.2d 918, 920 (Tex. Crim. App. 1969) (one or two erroneous exclusions, 14 unused peremptories), *rev'd*, 403 U.S. 946 (1971); *Ladetto* v. *Massachusetts*, 356 Mass. 541, 544, 254 N.E.2d 415, 417 (1969) (3 erroneous exclusions, 33 unused peremptories, *rev'd*, 403 U.S. 947 (1971); *Speck* v. *Illinois*, 41 Ill. 2d 177, 213-14, 242 N.E.2d 208, 227-28 (1968) (50 erroneous exclusions, 79 unused peremptories), *rev'd*, 403 U.S. 946 (1971); *Bernette* v. *Illinois* and *Tajra* v. *Illinois*, 45 Ill. 2d 227, 232, 258 N.E.2d 793, 796 (1970) (12

[6] The Mississippi sentencing scheme, as the Texas scheme under consideration in *Marion* v. *Beto*, supra, requires that a sentence of death be unanimous. Miss. Code Ann. 99-19-101(3).

erroneous exclusions, 33 unused peremptories), *rev'd*, 403 U.S. 947 (1971); *Mathis* v. *New Jersey*, 52 N.J. 238, 251, 245 A.2d 20, 27 (1968) (3 erroneous exclusions, 5 unused peremptories), *rev'd*, 403 U.S. 946 (1971). Other courts, in opinions written by jurists with substantial experience either as trial counsel or as trial judges, have rejected the notion that the reservation of peremptory challenges renders the erroneous exclusion of jurors harmless. See, e.g., *Moore* v. *Estelle*, 670 F.2d 56 (5th Cir. 1982).

The theory that the presence of unused peremptory challenges negates the harm of an erroneous exclusion was rejected prior to *Davis*, by *Davis*[7] and should be rejected today. Even without questioning the sincerity of prosecutors, appellate courts should not "countenance what amounts to an attempt to exercise retroactively . . . peremptory challenges reserved at the time [of trial]." *Moore* v. *Estelle*, 670 F2d at 57. (Gee, Circuit Judge). "What would have happened [if a juror had not been erroneously stricken for cause] is seldom a subject of satisfactory proof. . . ." Id.

Adoption of such a methodology for examining *Witherspoon* issues would be fundamentally unfair and render review of this issue meaningless. *Grijalva* v. *State*, 614 S.W.2d 420 (Tex. Cr. App. 1981) (Odom, J.). First, reservation of challenges for exercise on appeal would give prosecutors an unfair advantage. Rather than exercising his challenges in a give and take fashion with the defense, as was required in the instant case, a prosecutor could save a few challenges to be exercised after everyone has

[7] In his dissenting opinion in *Davis*, Justice Rehnquist took issue with the majority opinion on the question of unused peremptory challenges. 429 U.S. at 125, 97 S.Ct. at 400.

gone home. Then, with the benefit of 20/20 hindsight, he could "cure" any error that might have occurred.

Second, it is not difficult to imagine prosecutors taking advantage of a decision that reverses *Davis*. Every prosecutor in a capital murder trial would then save one or two peremptory challenges for use by appellate counsel. No case could be meaningfully reviewed.

An alternative, and perhaps even more compelling argument against adoption of an unused peremptories--harmless error rule was advanced by Judge Goldberg in his concurrence in *Moore* v. *Estelle*, supra. Judge Goldberg reasoned that the crucial question was not the affect of the erroneous ruling on a particular venireman. Rather, the erroneous ruling affected the composition of the entire jury.

> The proper focus of our inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error. While it may be true that the exclusion of a particular venireman was not affected by the trial court's erroneous ruling, it does not necessarily follow that the composition of the entire jury panel was unaffected by the error.

In Texas capital cases, veniremen are examined seriatum by the defense and prosecution. "[P]rospective jurors . . . are examined individually and must be challenged and passed upon separately." *Pierson* v. *State*, 614 S.W.2d 102, 107 (1981). Thus, as a prospective juror comes before the court, the prosecutor must then and there decide whether she will accept the juror, challenge for cause, or exhaust one of her limited number of peremptories. Clearly, the prosecutor's strategic calculus is affected by the number of peremptory challenges left to her and by the number of jury panelists still awaiting selection. As the prosecutor depletes her limited number of

peremptory challenges, she may be willing to accept certain jurors she might have otherwise rejected given a larger reserve of peremptories.

The import of this observation should be clear. Texas claims that it would have used three of its peremptory challenges to exclude the three jurors found to have been improperly excused for cause. However, even if we assume that the prosecutor in this case would have used those three additional peremptory challenges, how can we know beyond a reasonable doubt that the selection of the remainder of the jury panel would have been unaffected? If the trial court had ruled properly and the prosecution had been forced to use these three additional peremptory challenges, it is entirely possible that the State would have chosen to acquiesce in the impaneling of other prospective jurors it actually challenged given the luxury of a pocketful of "peremptories." 670 F.2d at 58 (Emphasis in original).

A variant of a seriatum examination of the venire was employed at Petitioner's trial. Rather than accept or challenge veniremen one at a time, counsel here accepted or challenged finite groups of veniremen. Once a member of a group had been accepted, he or she could not later be challenged. Thus, Judge Goldberg's reasoning is appropriate here. Erroneous exclusions of jurors affect the "strategic calculus" of the exercise of peremptory challenges and impact upon the selection of a panel of jurors as a whole.

1. The Nature Of A Jury's Sentencing Decision And The Inability To Fairly Review The Harm Caused By An Erroneous Exclusion Mandates A Per Se Approach.

Finally, the erroneous exclusion of a scrupled juror is not susceptible to any form of harmless error analysis. The erroneous exclusion should require reversal of a sen-

tence of death per se. The nature of the jury's decision and the inability to fairly review the harm caused by an erroneous exclusion mandates a per se approach.[8]

In Mississippi, a sentence of death must be pronounced by a jury. Miss. Code Ann. § 99-19-101(1). Its verdict must be unanimous. Miss. Code. Ann. § 99-19-101(3). Though not unguided, a Mississippi sentencing jury exercises a discretionary balancing function in deciding to impose a sentence of life or death. Id. The jury is required to balance aggravating factors against mitigating factors; neither of which are limited by those delineated in the statute. Miss. Code. Ann. § 99-19-101 (In the proceeding, evidence may be presented as to any matter that the court deems relevant to [the] sentence. . . .); *Barclay* v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134, *reh den* 464 U.S. 874 (1983).

Deciding whether a defendant should live or die, even under a system that guides a jury's discretion, is nothing like the factual determination made by juries in determining guilt or innocence. Even under sentencing schemes that are more restrictive than that in Mississippi, the jury exercises significant discretion (e.g. Texas' statutory scheme of three questions). "This process is not an exact science, and the jurors . . . unavoidably exercise a range of judgment and discretion while remaining true to their

[8] This court has adopted a per se approach in other areas as well. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel) and *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial judge); and *Vasquez* v. *Hillery*, 54 U.S.L.W. 4069 (Decided January 14, 1986) (Marshall, Brennan, Blackmun and Stevens, JJ.) (improper exclusion of grand jurors).

instructions and oaths." *Adams* v. *Texas*, 448 U.S. 38, 47, 100 S.Ct. 2521, 2527, 65 L.Ed.2d 581 (1980).[9]

Review of a sentence of death is not similar to the review of a record to determine if an error was harmless beyond a reasonable doubt. See, *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In reviewing the improper excusal of a juror, an appellate court cannot excise erroneously admitted evidence and then comb the record on a factual search. The decision to sentence a man or woman to death is not a factual determination. It is a moral one. *Barclay*, 463 U.S. at 951, 103 S.Ct. at 3419, 71 L.Ed.2d at 1144. ("It is entirely fitting for the moral, factual, and legal judgments of judges and juries to play a meaningful role in sentencing.")

An appellate court cannot find that the manner in which a killing occurred outweighs the youth of the killer. Or, that the fact of a defendant's sub-standard intellect does not outweigh the fact that he killed in the course of a robbery. These delicate balances are not for an appellate court to make. Be they ultimately proven right or wrong, these decisions belong to the consciences and morals of the diverse communities in the various states that have enacted capital punishment statutes. This Court, under the guise of harmless error analysis, must not become the ultimate arbitor of who lives and dies.

"The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the *factual* question of the defendant's guilt or innocence [cite omitted] and promotes public respect for the criminal

[9] "It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury [than that employed in Texas]. . . ." *Adams*, 448 U.S. at 465, 100 S.Ct. at 2530 (Rehnquist, J. dissenting).

process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 54 U.S.L.W. 4347, 4349 (Decided April 7, 1986). (Citation omitted) (Emphasis added.)

The decision to impose a sentence of death is not factual; it involves the delicate balancing of a series of intangible factors. Further, the alteration of the composition of a jury by the improper exclusion of veniremen is not immaterial. On issues of morality, if nowhere else, jurors are not fungible.

This Court should not use the instant case as an opportunity to reverse *Davis*. Instead, this Court should reaffirm *Davis* and reverse Petitioner's sentence of death.

CONCLUSION

For the foregoing reasons, this Court should reverse Petitioner's sentence of death and remand the cause for a new sentencing hearing.

Respectfully submitted,

ANDRU H. VOLINSKY
SCHAPIRA AND VOLINSKY, P.A.
108 Bay Street
Manchester, NH 03104
Telephone: (603) 669-7603
Counsel for Petitioner